Supreme Court, U.S.
FILED
JUN 9 1995
OFFICE OF THE CLERK

(3)

No. 94-1838

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

OXY USA INC.,

Petitioner,

v.

CONTINENTAL TREND RESOURCES, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY MEMORANDUM

THEODORE B. OLSON
THEODORE J. BOUTROUS, JR.
JOHN K. BUSH
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

W. DEVIER PIERSON*
MARK E. GREENWOLD
PIERSON SEMMES AND BEMIS
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
(202) 333-4000

Attorneys for Petitioner
** Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

BEST AVAILABLE COPY

15pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY MEMORANDUM 1

TABLE OF AUTHORITIES

Cases:	Page(s)
Aetna Life Ins. Co. v. *Lavoie*, 475 U.S. 813 (1986)	1, 2
Bankers Life & Casualty Co. v. *Crenshaw*, 486 U.S. 71 (1988)	1
BMW of N. Am., Inc. v. *Gore*, No. 94-896	1, 4, 5
Browning-Ferris Indus. of Vt., Inc. v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989)	1
DeRance, Inc. v. *PaineWebber, Inc.*, 872 F.2d 1312 (7th Cir. 1989)	7
Dunn v. *HOVIC*, 1 F.3d 1371 (3d Cir.), *modified in part*, 13 F.3d 58 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993)	7
Erie R.R. Co. v. *Tompkins*, 304 U.S. 64 (1938)	6
Gardner v. *Federated Dep't Stores, Inc.*, 907 F.2d 1348 (2d Cir. 1990)	6
Gutierrez-Rodriguez v. *Cartagena*, 882 F.2d 553 (1st Cir. 1989)	5
Herold v. *Burlington Northern, Inc.*, 761 F.2d 1241 (8th Cir.), *cert. denied*, 474 U.S. 888 (1985)	6
Holmes v. *Elgin, Joliet & E. Ry.*, 18 F.3d 1393 (7th Cir. 1994)	6
Honda Motor Co. v. *Oberg*, 114 S. Ct. 2331 (1994)	*passim*

Levka v. *City of Chicago*, 748 F.2d 421 (7th Cir. 1984) 7

Marcel v. *Placid Oil Co.*, 11 F.3d 563 (5th Cir. 1994) 6

Morgan v. *Woessner*, 997 F.2d 1244 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994)..... 6

Morrow v. *Greyhound Lines, Inc.*, 541 F.2d 713 (11th Cir. 1976)..... 6

Motter v. *Everest & Jennings, Inc.*, 883 F.2d 1223 (3d Cir. 1989)..... 6

Pacific Mut. Life Ins. Co. v. *Haslip*, 499 U.S. 1 (1991)..... 1, 2, 8

Payton v. *New York*, 445 U.S. 573 (1980) 9

Raley v. *Ohio*, 360 U.S. 423, 436 (1959) 9

Raucci v. *Town of Rotterdam*, 902 F.2d 1050 (2d Cir. 1990) 6

Soto v. *United States*, 11 F.3d 15, 18 (1st Cir. 1993)..... 6

Thompson v. *National R.R. Passenger Corp.*, 621 F.2d 814, 827 (6th Cir.), *cert. denied*, 449 U.S. 1035 (1980)..... 6

Trevino v. *United States*, 804 F.2d 1512 (9th Cir. 1986), *cert. denied*, 484 U.S. 316 (1987)..... 6

TXO Production Corp. v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993) 1, 2, 8

Rule:

Fed. R. Civ. P. 59 5

Other Authorities:

Brief *Amici Curiae* of Life Ins. Co. of Ga., *et al.*, in *BMW of N. Am., Inc.* v. *Gore*, No. 94-896..... 3

Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.16, at 192-93 (7th ed. 1993) 5

REPLY MEMORANDUM

Respondents' Brief in Opposition to Certiorari does not refute the compelling reasons that support granting of certiorari in this case. Indeed, the Court has granted certiorari in *BMW of North America, Inc.* v. *Gore*, No. 94-896, which presents one question that is virtually identical to Question 3 in this case,[1] and another question concerning the permissible bases for punitive damages, an issue that is also a factor here. The questions presented by this case were pressed and explicitly passed upon by the court below, and recur constantly in punitive damage litigation in the federal courts.

1. Respondents contend that the questions presented are neither important nor likely to recur, *see, e.g.*, Opp. at 11-12, but that assertion cannot be squared with this Court's jurisprudence. The Court has accepted seven cases raising constitutional objections to punitive damages in civil litigation during the past ten years.[2] In countless other recent cases, the Court, or individual Justices, have

---

[1] *Compare* Pet. at i ("Whether a $30,000,000 punitive damage award, which is more than 100 times greater than respondent's compensatory damages, is so excessive as to violate the Due Process Clauses . . . .") *with* Pet. in *BMW* at I ("Whether the $2,000,000 remitted punitive exaction, which is 500 times respondent's compensatory damages, is grossly excessive in violation of the Due Process Clause . . . .").

[2] *BMW of N. Am., Inc.* v. *Gore*, No. 94-896; *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331 (1994); *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993); *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991); *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71 (1988); *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813 (1986).

expressed reservations concerning the capricious, excessive, unpredictable and potentially unjust manner in which punitive damages are awarded. *See Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 9-12 (1991) (citing cases).

In its six previous punitive damage decisions, the Court has made clear that punitive damages raise "important" constitutional questions that "must" be resolved, *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986), and has held that Due Process places both substantive and procedural limitations on the magnitude of punitive damages and the manner in which they are awarded. *E.g.*, *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2335 (1994). Unfortunately, apart from these general conclusions, the Court's constitutional guidance has been unclear at best: the six prior cases resulted in twenty-two separate opinions and very little concrete guidance. In its most recent decision involving the question of excessiveness, the Court produced a three-Justice plurality opinion on some issues, a four-Justice plurality on others, and three additional concurring and dissenting opinions.[3]

Despite the Court's concern regarding the magnitude of punitive damages and the processes that produce these awards, the magnitude and frequency of punitive damage awards in state and federal courts have continued to grow explosively. *See Haslip*, 499 U.S. at 61 (O'Connor, J.,

---

[3] *TXO*, 113 S. Ct. at 2711-24 (plurality opinion of Stevens, J., joined in its entirety by Rehnquist, C.J. and Blackmun, J. and joined as to Parts I and IV by Kennedy, J.); *id.* at 2724-26 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 2726-28 (Scalia, J., joined by Thomas, J., concurring in the judgment); *id.* at 2728-42 (dissenting opinion of O'Connor, J., joined in its entirety by White, J. and joined as to Parts II-B-2, II-C, III, and IV, by Souter, J.).

dissenting); Brief *Amici Curiae* of Life Ins. Co. of Ga., *et al.*, in *BMW of N. Am., Inc.* v. *Gore*, No. 94-896, at 14-21, App. A-C. Indeed it has become relatively common for jurors to award tens or hundreds of millions of dollars in punitive damages.[4]

Uncertainty regarding what is an excessive punitive damage award, what factors may be considered in dispensing this form of state-sanctioned punishment, and the standards by which jury verdicts are to be reviewed has led to confusion and inconsistency throughout the United States. Except in the most subjective of terms, juries simply do not know how much punitive damages to award, and trial and appellate courts do not know how much punishment to approve. Indeed, the features common to most cases are that (1) juries are advised to award as much as they deem necessary to punish and deter according to whatever factors they choose to consider, (2) the wealth of the defendant is the overriding, dominant factor in many cases, and (3) post-trial and appellate review is indefinably subjective except that it is usually based on some variation of a "shock-the-judicial-conscience" test.[5]

This case is a particularly egregious manifestation of the state of punitive damage jurisprudence in the United States:

---

[4] For example, California juries are now awarding punitive damage awards in excess of $10,000,000 on an average of once every 2.3 months. *See id.*, App. C.

[5] Respondents were unable to unearth a single additional decision of a federal appellate court since *TXO* reducing a punitive damage award on grounds of excessiveness. None of the three post-*TXO* cases cited by respondents as proof that excessiveness review is effective did, in fact, reduce a punitive damage award on excessiveness grounds. *See* Opp. at 13 n.15.

A $30,000,000 punitive damage award, six times higher than the highest previously confirmed award under applicable state law and the largest disputed award ever affirmed by a federal appellate court, for a fully redressed economic injury of $269,000. The award was rationalized below largely on the basis of the financial condition of the defendant and conduct not directly at issue in the case below, allegedly involving unidentified other parties, unspecified other jurisdictions, and undefined injury to the United States in the world economy.[6]

2. This Court agreed to review *BMW of North America, Inc.* v. *Gore*, presumably to afford itself the opportunity to articulate meaningful and reliable guidance concerning how excessiveness may be measured and the extent to which a defendant's punishment may be predicated upon factors such as conduct by the defendant that occurred in other cases or other venues. This case presents essentially the same questions as *BMW*, *i.e.*, what makes a punitive damage award constitutionally excessive, and what factors, such as the defendant's wealth, or alleged conduct beyond the scope of the case before the Court, may provide a constitutionally acceptable foundation for a

---

[6] Respondents devote much energy restating their version of the "facts" of this case apparently in an effort to convince the Court that petitioner's constitutional claims are unworthy of consideration. OXY rejects categorically respondents' characterizations of the record, but the issue at this stage of the case is not whether OXY committed a wrong, but whether the punishment that has been imposed against it satisfies the Constitution and federal standards of review. As this Court observed in *Honda*, "[w]hat we are concerned with is the possibility that a guilty defendant may be unjustly punished; evidence of guilt warranting some punishment is not a substitute for evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing." 114 S. Ct. at 2339.

punishment. Like the petitioner in *BMW*, OXY claims that its punishment was excessive. Also, as in *BMW*, OXY was punished for conduct that was extraneous to the dispute between the parties. Respondents -- and the courts below -- have referred to "6,000" other contracts, Opp. at 3, Pet. App. 15a n.14, the particulars of which were not before the court below, and unspecified, intangible damage to the United States in the global economy. Pet. App. 51a. Punishment for such matters, and punishment based on a defendant's wealth, raise important constitutional questions, as the grant of certiorari in *BMW* suggests.

In short, it would make no sense, and would perpetrate an immense injustice, to deny review in this case while the *BMW* case, which is certain to affect the disposition of this case, is pending. *See generally* Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.16, at 192-93 (7th ed. 1993).

3. Contrary to respondents' assertion that there is no conflict in the courts of appeals regarding the standards to be applied by federal courts in reviewing the size of punitive damage awards, *see* Opp. at 8-9, 17-20, a substantial conflict exists regarding whether, as a matter of federal due process or under Rule 59 of the Federal Rules of Civil Procedure, comparative analysis of damage awards should be undertaken. The level of confusion and divergence in approach is obvious and the courts of appeals themselves have taken note of it. *See, e.g., Gutierrez-Rodriguez* v. *Cartagena*, 882 F.2d 553, 579 (1st Cir. 1989) (noting split of authority regarding whether comparative analysis is required). The First, Eighth and Tenth Circuits

do not regularly engage in a comparative review,[7] while other Circuits require such review.[8]

Comparative review of damage awards is all the more important where the controlling law underlying the claim at issue is provided by state rather than federal law. Numerous federal courts have recognized, consistent with the principles of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), that damage awards in federal court cases governed by state law should be compared with awards in state cases to ensure consistency between federal and state court awards. *See, e.g., Raucci* v. *Town of Rotterdam*, 902 F.2d 1050, 1058 (2d Cir. 1990); *Marcel* v. *Placid Oil Co.*, 11 F.3d 563, 568 (5th Cir. 1994); *Morrow* v. *Greyhound Lines, Inc.*, 541 F.2d 713, 721-22 (11th Cir. 1976).

Respondents misstate the holdings of the cases requiring a comparative analysis. Contrary to Respondents' argument, the Ninth Circuit, in *Morgan* v. *Woessner*, 997 F.2d 1244 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994), *required* district courts to conduct a comparative review. *Id.* at 1257 ("the court should look to awards in

---

[7] *See Soto* v. *United States*, 11 F.3d 15, 18 (1st Cir. 1993); *Herold* v. *Burlington N., Inc.*, 761 F.2d 1241, 1248 (8th Cir.), *cert. denied*, 474 U.S. 888 (1985); Pet. App. at 14a, 20a.

[8] *See Holmes* v. *Elgin, Joliet & E. Ry.*, 18 F.3d 1393, 1396 (7th Cir. 1994); *Marcel* v. *Placid Oil Co.*, 11 F.3d 563, 568 (5th Cir. 1994); *Gardner* v. *Federated Dep't Stores, Inc.*, 907 F.2d 1348, 1353 (2d Cir. 1990); *Motter* v. *Everest & Jennings, Inc.*, 883 F.2d 1223, 1230-31 (3d Cir. 1989); *Trevino* v. *United States*, 804 F.2d 1512, 1515 (9th Cir. 1986), *cert. denied*, 484 U.S. 316 (1987); *Thompson* v. *National R.R. Passenger Corp.*, 621 F.2d 814, 827 (6th Cir.), *cert. denied*, 449 U.S. 1035 (1980); *Morrow* v. *Greyhound Lines, Inc.*, 541 F.2d 713, 721-22 (11th Cir. 1976).

similar cases"). The Ninth Circuit based this holding on federal law, not California law, as Respondents suggest. *Dunn* v. *HOVIC*, 1 F.3d 1371 (3d Cir.), *modified in part*, 13 F.3d 58 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993), is equally misconstrued. The Third Circuit expressly cited this Court's opinion in *Haslip* as the basis for requiring comparative review.

Finally, the Seventh Circuit in *DeRance, Inc.* v. *Paine Webber, Inc.*, 872 F.2d 1312, 1329-30 (7th Cir. 1989), did not apply state law to determine that it should engage in comparative analysis; the authority cited in support of its conclusion, *Levka* v. *City of Chicago*, 748 F.2d 421, 425 (7th Cir. 1984), involved claims under federal law arising in a different State.

These distinctions are significant and outcome determinative in this case. If the Tenth Circuit had compared the award in this case to punitive damage awards permitted by Oklahoma state courts, it would have found that every punitive damage award greater than $2 million presented to an Oklahoma appellate court was reduced by at least fifty percent. *See* Pet. at 18-19. Affirmance by a federal court of an award so disproportionate to state court practice -- without comparative review of the state cases -- is inconsistent with the primacy of state law recognized in *Erie*.

4. Respondents misperceive the second question presented in the petition. This question does not call upon the Court to address the error in the jury instruction that focused on OXY's financial condition. Rather, it squarely presents the issue that troubled several Justices in *TXO*: whether severe punishments against large corporate defendants may be based primarily on the net worth of the defendant. This issue is clearly important, as evidenced by this Court's repeated statements of concern on the subject.

See Honda, 114 S. Ct. at 2340; *Haslip*, 499 U.S. at 22; *TXO*, 113 S. Ct. at 2723.

5. Respondents argue that certiorari should be denied because state or federal legislators "are dealing with" "[the] so-called 'punitive damage crisis.'" Opp. at 12. That would be an inappropriate reason for denying certiorari, especially where the Court has already decided to consider issues that are quite similar, if not identical, to the issues presented by this petition. The possibility, such as it is, that punitive damage abuses may conceivably be addressed at some time in the future by legislation is no basis for denying the victim of this $30,000,000 penalty the benefit of this Court's review of the constitutional issues that this Court has already decided to hear.

6. Respondents' "waiver" arguments are without merit. As the court below explicitly recognized, OXY "strenuously argue[d] that the [punitive damage] award violated both procedural and substantive due process." Pet. App. 11a-12a. OXY expressly raised below -- and the Court of Appeals expressly ruled on -- each of the three questions presented by the petition. Indeed, in a section of its opinion entitled **"Substantive Due Process/Excessiveness,"** the court, relying on its interpretation of *Haslip* and *TXO*, concluded that the $30,000,000 punitive damage award was not so excessive as to violate due process. Pet. App. 18a-22a.

The court below also specifically ruled that its "shock-the-conscience" standard of review of punitive damages "satisfies constitutional standards," *id.* 19a, and rejected OXY's argument that federal judicial review of punitive damage verdicts must include a comparative analysis. *See, e.g., id.* 14a ("OXY argues that the district court's review here was inadequate in that it should have compared the award in this case with awards in similar cases. . . . [W]e

will not require a district court to set out a comparative analysis . . . ."); *see also id.* 20a ("[W]e would exceed our scope of review if we required symmetry in the manner OXY suggests."). And the Court of Appeals likewise rejected OXY's argument that the punishment here violated due process because it was based predominantly on OXY's wealth rather than its conduct. *See, e.g., id.* 14a (rejecting OXY's argument that "the district court made no effort to articulate a basis for the award other than wealth"); *id.* 19a (rejecting OXY's argument that due process was violated because "plaintiffs' closing argument was inflammatory on the issue of OXY's wealth").

Given the Court of Appeals' express rulings on each of the questions raised in the petition, they are indisputably properly presented for this Court's review. "There can be no question as to the proper presentation of a federal claim when the [court below] passes on it." *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959); *Payton* v. *New York*, 445 U.S. 573, 582 n.19 (1980) (because the court below decided the constitutional issue, "there is no doubt that it is properly presented for review by this Court").

* * * *

While many punitive damage issues are the same in state and federal courts, federal court review of punitive damage awards presents different questions than those faced in state courts, and this Court has a special responsibility to ensure that the federal courts are doing their job fairly and responsibly. Since the issues presented by this case are similar to those involved in *BMW*, but present themselves in the context of a federal court proceeding, this case should be accepted for review or, at minimum, held for a decision concerning review until resolution of *BMW*.

Dated: June 9, 1995

Respectfully submitted,

Theodore B. Olson
Theodore J. Boutrous, Jr.
John K. Bush
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

W. DeVier Pierson*
Mark E. Greenwold
PIERSON SEMMES AND BEMIS
1054 Thirty-first Street, N.W.
Washington, D.C. 20007
(202) 333-4000

Attorneys for Petitioner
* *Counsel of Record*